91-1631

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

GURNEY ALFRED,

Petitioner

v.

UNITED PARCEL SERVICE, INC., et al.,

Respondents

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a union representative's failure to provide a full investigation of a grievance constitutes perfunctory conduct and breaches the union's duty of fair representation?

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following parties have an interest in the outcome of this proceeding.

Gurney Alfred – Petitioner

United Parcel Service, Inc. – Respondent

General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local No. 270 – Respondent

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OPINIONS AND REPORTS

The opinion of the Court of Appeals for the Fifth Circuit has not been reported and is reprinted in the appendix hereto. The opinion of the U.S. District Court has not been reported and is also reprinted in the Appendix hereto.

JURISDICTIONAL STATEMENT

The judgment of the U.S. Court of Appeals for the Fifth Circuit was entered on January 10, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

29 U.S.C. section 185

28 U.S.C. section 1245 (1)

STATEMENT OF THE CASE

Course of Proceedings And Disposition Below

Gurney Alfred filed this action against the United Parcel Service, Inc., and General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 270 on November 17, 1989. Pursuant to § 301 of the Labor Management Relations Act of 1947 (29 U.S.C. Section 185), Gurney Alfred sought to recover damages for his unlawful discharge by the defendant, United Parcel Service, Inc., and for breach of fair representation by defendant General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 270.

The defendants filed separate motions for summary judgment which the District Court granted on January 17, 1991.

A petition for rehearing was filed with the District Court on February 1, 1991 and was subsequently denied on May 20, 1991.

Upon the District Court's denial of the petition for rehearing, a notice of appeal was timely filed on June 18, 1991.

On January 6, 1992, the U.S. Court of Appeals for the Fifth Circuit heard oral arguments and subsequently affirmed the judgment of the District Court on January 10, 1992, without opinion on the issues raised in the appeal.

ARGUMENT

Summary judgment is proper when the party defending against the motion can not establish the existence of the elements which are essential to his case. *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986). However, if the party defending against the motion can show that a genuine issue of material fact remains on the essential elements of his case, then the motion should be denied as a matter of law. See *McCrae v. Hankins*, 720 F.2d 863 (5th Cir. 1983).

In the case at bar, petitioner alleged that he was unlawfully discharged by respondent, United Parcel Service (U.P.S.), Inc., for "dishonesty" for allegedly making unauthorized long distance calls at the company's expense. Furthermore, the petitioner alleged that the respondent, General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 270 (union)

failed in its duty to fairly represent him in the grievance process. In order to prevail against either respondent, the petitioner carries the burden of demonstrating a breach of duty by the union regardless of his claim against the employer; establishing a breach of duty by the union is the threshold requirement in such a hybrid suit. *Hines v. Anchor Motor Freight, Inc., et al.*, 424 U.S. 554, 96 S.Ct. 1048 (1976). In order to show that the union violated its duty of fair representation, the petitioner must establish that the union's conduct toward a member was arbitrary, discriminatory, or in bad faith, or that the union acted in a perfunctory fashion. *Hines*, supra, *Del Costello v. International Brotherhood of Teamsters, et al.*, 462 U.S. 151, 1035 S.Ct. 2281 (1983), *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903 (1967). In policing union conduct that is arbitrary and perfunctory, courts have been willing to look beyond the question of whether a union in fact pursues an employee's grievance (contractual or statutory) and determines whether the union has made a full investigation, has given the grievant notice and an opportunity to participate, has mustered colorable arguments, and has refuted insubstantial arguments by the employer. R. Gorman, *Labor Law* 718 (1976). Although Mr. Gorman's definition of perfunctory is plausible, this court has never given its definition on what conduct on the part of a union would be considered perfunctory.

Using Mr. Gorman's definition, petitioner has clearly raised a genuine issue of material fact with respect to the investigation undertaken by the union representative. In the case at bar, petitioner, Gurney Alfred, was accused of making unauthorized long distance calls at the expense of U.P.S. The Union representative failed in his investigation

inasmuch as he did not investigate this allegation at all. The only step taken by the union representative was to tell the petitioner to call the number and get a statement that he had not called the number. Such inaction on the part of the union representative implies that he performed his duty in a perfunctory fashion.

The union representative, Nolan LeBlanc, presented an affidavit which stated that he had thirty-seven years of experience representing union members and that he investigated and processed petitioner's grievance. Surely, the act of telling the grievant to call the suspected number and get a statement from them does not equate to a full investigation. Mr. LeBlanc could have checked the petitioner's time sheets against the phone bill, spoke with other employees working petitioner's shift, or pursued a number of other avenues given the fact that Mr. LeBlanc has thirty-seven years experience in such matters.

This Court has stated that the breach of the duty of fair representation must affect the result or outcome of the proceeding. *Humphrey v. Moore*, 375 U.S. 335, 84 S.Ct. 363 (1964). Petitioner submits that if the union representative had performed a cursory investigation, then the outcome of the proceeding would have been different. However, by the failure to afford the petitioner with a full investigation, which was his right to have, the union breached its duty of fair representation.

CONCLUSION

The Fifth Circuit Court of Appeal affirmed the District Court's opinion and judgment without comment or reasons. The opinion of the District Court was in error because the court failed to recognize that the union acted in a perfunctory fashion breaching its duty to provide a full investigation for petitioner. Moreover, because the lower courts have not expressed a consensus concerning the meaning of perfunctory, this Court has a duty to guide the lower courts by defining what conduct constitutes a perfunctory performance in the context of a duty to provide a full investigation.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3527

GUERNEY ALFRED,

Plaintiff-Appellant,

versus

UNITED PARCEL SERVICE, INC.,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Middle District of Louisiana
(CA-89-876-A-M1)
(January 10, 1992)

Before POLITZ, SMITH, Circuit Judges and FITZWATER*, District Judge.

PER CURIAM:**

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* District Judge of the Northern District of Texas sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

This matter is before the court on the appeal of Guerney Alfred of an adverse summary judgment in favor of United Parcel Service and General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 27. Having considered the briefs and oral arguments of counsel and the pertinent parts of the record, and finding no reversible error, the judgment of the district court is AFFIRMED.

APPENDIX B

MIDDLE DISTRICT OF LOUISIANA

GURNEY ALFRED

VERSUS CIVIL ACTION

UNITED PARCEL SERVICE, INC., ET AL NO. 89-876-A

RULING ON MOTION FOR REHEARING

This matter is before the court on a motion by plaintiff for "rehearing." Defendants have filed an opposition. There is no need for oral argument.

Plaintiff moves for a new trial on the basis of "newly discovered evidence." Plaintiff's motion is clearly without merit, as shown by the opposition filed by defendants.

Accordingly, the motion by plaintiff for "rehearing" is hereby DENIED.

Baton Rouge, Louisiana, May 20, 1991.

/s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX C

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GURNEY ALFRED

VERSUS CIVIL ACTION

UNITED PARCEL SERVICE, INC., ET AL NO. 89-876-A

RULING ON MOTIONS FOR SUMMARY JUDGMENT

This matter is before the court on motions for summary judgment brought by each of the two defendants. Plaintiff has filed an opposition. There is no need for oral argument. Jurisdiction is allegedly based upon §301 of the Labor Management Relations Act of 1947, 29 USC §185.

Plaintiff, Gurney Alfred, alleges that he was unlawfully discharged by defendant, United Parcel Services, Inc., on May 18, 1989, for "dishonesty." More specifically, UPS allegedly fired plaintiff for making unauthorized long distance telephone calls at the company's expense. Plaintiff further claims that defendant, General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 270, failed to fairly represent him in pursuing his grievance under the collective bargaining agreement.

In support of their motions for summary judgment, the company and the local union contend that the undisputed facts show that plaintiff was fairly represented in the grievance proceedings. Defendants additionally argue

that plaintiff's state law claims are preempted by the Labor Management Relations Act.

It is well established that the outcome or finality of a grievance proceeding is subject to very limited judicial review. DelCostello v. International Broth. of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). In order to prevail against either the employer or the union, plaintiff must not only show that his discharge was contrary to the collective bargaining agreement but that the union breached its duty of fair representation as well. Id.

A breach of the duty of fair representation occurs only when the union's conduct is arbitrary, discriminatory or in bad faith. Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). Moreover, the breach must affect the result or outcome of the grievance proceedings. See Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964).

In his opposition, plaintiff refers to two "breaches" by the Union. The first breach purportedly occurred on May 15, 1989, when the station manager initially questioned plaintiff about the unauthorized telephone calls without a "proper representative" being present. There is no dispute that Freeman Jennings, the designated mechanic steward, was summoned because no other stewart was available. Plaintiff has failed to demonstrate how this constitutes a breach or how it had any effect upon the ultimate decision, especially since plaintiff admits he was fairly represented at the meeting before the Grievance Committee on July 19, 1989.

The second breach allegedly occurred at the June 15th grievance meeting when Freeman Jennings indicated

(by nodding his head) that plaintiff had previously admitted to making some long distance phone calls. Plaintiff argues this was a "definite breach" because plaintiff never admitted making the phone calls in question. However, even plaintiff concedes that Jennings might have been confused since plaintiff did admit to making some phone calls, albeit to another telephone number. The court fails to comprehend how this amounts to conduct which is arbitrary, discriminatory or in bad faith.

Plaintiff additionally contends that his representative should have pursued a settlement offer that allegedly was made at the June 15th meeting. Plaintiff argues that the union failed to "pursue every avenue" by not acting on the settlement proposal. This argument patently lacks merit because based upon plaintiff's own testimony, the offer was effectively withdrawn only seconds after it was made.

Finally, plaintiff complains about the union's failure to interview "the individual Mr. Alfred allegedly placed calls to." Plaintiff contends that "this individual" has since testified by way of deposition that "she not only never received any calls from Mr. Alfred but that she has neither seen him before nor ever heard of him." The court assumes that plaintiff is referring to the deposition of Mrs. Willie Mae Turner, defendants' exhibit "G". That testimony in no way exonerates plaintiff since it is clear that the individual the company believed plaintiff had been calling was Mrs. Turner's daughter. If the daughter's deposition has been taken, plaintiff has failed to submit it. Moreover, as defendants correctly point out,

plaintiff himself secured a written statement from Mrs. Turner which was presented at the initial hearing.

The court further agrees with defendants that plaintiff's state law claims are preempted. See Strachan v. Union Oil Co., 768 F.2d 703 (5th Cir. 1985). Moreover, the court would decline to maintain jurisdiction over such claims as the federal claims have been resolved.

Accordingly, the motions by defendants for summary judgment are hereby GRANTED and judgment will be entered in favor of each defendant.

Baton Rouge, Louisiana, January 14, 1991.

/s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA